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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LEON LEONARD MIZRAHI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S REPLY BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I      LOCAL BOARD MEMORANDUM NO. 72 IS INAPPLICABLE TO THE INSTANT CASE.	1
CONCLUSION	9



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Arver v. United States, 245 U.S. 366 (1918)	3
De Moss v. United States, 218 F.2d 119 (8th Cir. 1954), rev'd on other grounds 349 U.S. 918, 75 S.Ct. 659	3
Goodwin v. Rowe, N.D. W. Va., 49 F.Supp. 703 (1943)	3
Singer v. United States, 323 U.S. 338, 65 S.Ct. 282	3
Sterrett v. United States, 216 F.2d 659 (9th Cir. 1954)	3
Ex Parte Stewart, S.D. Calif., 47 F.Supp. 415 (1942)	3
United States ex rel Lawrence v. Commanding Officer, Neb., 58 F.Supp. 933 (1945)	3
Young v. Terminal R.R. Ass'n. of St. Louis, 70 F.Supp. 106 (E.D. Mo. 1947)	3

### Regulations

32 C.F.R., §1625.1(b)	8
32 C.F.R., §1625.2	1, 3-4, 8
Selective Service Regulations:	
1624.1	5-6
1625.2	9-10
1626.2	5, 7
1627.3	5, 7
1641.6	5-6





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I

LOCAL BOARD MEMORANDUM NO. 72 IS  
INAPPLICABLE TO THE INSTANT CASE

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The appellant in his reply brief has for the first time offered authority designed to escape the mandatory late claim provisions of 32 C.F.R. §1625.2.

In so doing, he argues the applicability in the instant case of Local Board Memorandum No. 72, issued by the Director of Selective Service on December 17, 1962. That memorandum reads as follows:

"SUBJECT: TIMELY FILING OR SUBMISSION OF  
NOTICES OR INFORMATION.



"1. Selective Service Regulations provide that a registrant and other specified persons, to be entitled to a procedural right or to qualify for a status, must file with or submit to the local board a notice or information within a specified period of time or before a 'cut-off' date.

"2. When such a notice or information is filed with or submitted to the local board by mail, the date or mailing as shown by the postmark on the envelope and not the date it was received by the local board shall be used in determining whether the filing or submission is timely.

"3. The envelope in which any such notice or information is received shall be placed in the registrant's cover sheet attached to the contents of the envelope."

Appellant then reasons as follows:

"Appellant's claim was supposed to be filed within ten days after his change of status occurred (SSR §1625. 1(b) ). Therefore, appellant's letter of February 26 was one of those embraced by Local Board Memorandum No. 72; and, though actually received by the Board on February 28, should have been deemed received on the preceding day."

(Appellant's Reply Brief, p. 5)



The instructions and memorandums of the Director of Selective Service are generally considered not to be mandatory but advisory only.

Sterrett v. United States, 216 F.2d 659

(9th Cir. 1954);

United States ex rel. Lawrence v. Commanding

Officer, Neb., 58 F.Supp. 933 (1945);

Ex parte Stewart, S.D. Calif., 47 F.Supp. 415

(1942);

Goodwin v. Rowe, N.D. W. Va., 49 F.Supp. 703

(1943).

Nevertheless they are clearly issued in order to amplify or clarify certain regulations which themselves do have the force of law.

Arver v. United States, 245 U.S. 366 (1918);

Singer v. United States, 323 U.S. 338, 65 S.Ct.

282;

DeMoss v. United States, 218 F.2d 119 (8th Cir.

1954), rev'd. other grounds, 349 U.S. 918,

75 S.Ct. 659;

Young v. Terminal R.R. Ass'n. of St. Louis,

70 F.Supp. 106, (E.D. Mo. 1947).

The issue presented then is this: whether LBM No. 72 is by its terms designed to modify and affect the explicit provisions of the governing regulation, 32 C.F.R. §1625.2. It is submitted that a reading of the local board memorandum, along with the



regulations to which it obviously has application, can lead to no other conclusion than that the memorandum is not applicable to the instant case and hence does not affect the late claim provisions of 32 C.F.R. §1625.2

Considering first the applicable regulation, it provides in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when a registrant was classified which, if true, would justify a change in the registrant's classification; . . . provided the classification . . . of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (emphasis added) 32 C.F.R. §1625.2

In comparing this regulation with LBM No. 72, one item is noteworthy: in citing LBM No. 72 in his brief, the appellant chose to take the material out of context. He completely ignored and did not include what would appear to be highly relevant: the various Selective Service regulations to which this memorandum





has application. At the upper righthand corner of the printed memorandum are the words "SSS Reg. " Beneath that is found the four regulations to which the memorandum clearly applies. They are Regulations 1624.1, 1626.2, 1627.3 and 1641.6.

The importance of the regulations listed is that they provide a clear guide line as to the intent in application of the memorandum.

SSS Regulation 1641.6 is one of the regulations mentioned in the local board memorandum. It provides as follows:

"The period of days allowed a registrant or other person to perform any act or duty required of him shall be counted as beginning on the day following that on which the notice to him is posted or mailed."

This regulation governs the time when the period begins to run in situations where a registrant must perform an act or duty within a specified period of time. That time is the date following that on which the notice is mailed.

It is clear, therefore, that LBM No. 72 was issued for one principal purpose: in order to permit a registrant to have the full period allowed to him under the regulations to submit information to a local board. The date of postmark, and not the date of receipt by the local board, is to be controlling.

The situation therefore to which LBM No. 72 relates is solely that wherein a registrant is required to submit facts or information to the local board within a specified period of time.



The only instances where the rule applies is where the Selective Service regulation provides that ". . . a notice or information" must be filed ". . . within a specified period of time or before a 'cut-off' date" in order ". . . to be entitled to a procedural . . . or to qualify for a status." Thus a reading of LBM No. 72, along with SSS Regulation 1641.6, clearly suggests its applicability only to this type of situation.

Furthermore, a reading of the three other Selective Service regulations mentioned in LBM No. 72, leads to the same conclusion. All three are of a type involving a specified period of time in which a registrant must file notice or information to a local board.

SSS Regulation 1624.1 relates to the right of registrant to appear before his local board. That regulation provides in pertinent part as follows:

"(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 30 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 30-day period may not be extended. "



This is obviously a specified period of time in which a registrant is to perform an act in order to obtain a procedural right. Hence LBM No. 72 is clearly applicable.

Another Selective Service regulation cited in LBM No. 72, is SSS 1626.2. That regulation provides in pertinent part that a ". . . registrant . . . may take an appeal . . . within 30 days after the date the local board mails to the registrant a Notice of Classification, (SSS Form 110)." This 30-day limitation is clearly a time period within which the registrant is required to file an appeal in order to be entitled to a procedural right. Again LBM No. 72 would be applicable to this situation.

The other regulation mentioned in LBM No. 72, is SSS Regulation 1627.3. That regulation governs the right to appeal to the President of the United States when an appeal board determination is not unanimous. That regulation is as follows:

"When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant, any person who claims to be a dependent of the registrant, or any persons who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant may appeal to the President within 30 days after the mailing by the local board of the Notice of Classification (SSS Form 110) notifying the registrant of this classification by the



appeal board. . . . "

This is clearly the kind of regulation in which the post-mark rule would be applicable.

These kinds of regulations to which LBM No. 72 applies, however, must be contrasted with the explicit provisions of 32 C.F.R. §1625. 2. That section in no way relates to a prospective date situation by which a registrant is required to submit notice or information in order to be entitled to a right of status. Rather, it is an administrative directive that after a time, namely, after a notice to report for induction is mailed, a specific determination must be made by the local board before it will be permitted to reopen.

Appellant attempts to come within the provisions of the local board memorandum in another way, that is, by arguing the application of 32 C.F.R. §1625. 1(b). Appellant states that his ". . . claim was supposed to be filed within ten days after his change of status occurred . . . " (Appellant's Reply Brief, p. 5)

32 C.F.R. §1621. 1(b) provides as follows:

"Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification, such as, but not limited







to, any change in his occupational, marital, military, or dependency status, or in his physical condition. Any other person should report to the local board in writing any such fact within 10 days after having knowledge thereof. "

That provision, however, in no way is applicable to the facts of the instant case for one apparent reason: the evidence is totally devoid of any facts whatsoever to indicate that the change of status to a conscientious objector occurred within ten days prior to the mailing of the order to report for induction. To the contrary, the SSS Form 150 filed by appellant quite clearly reflected that any conscientious objector beliefs that the appellant may have had, occurred considerably before the notice to report for induction was mailed. [p. 105, SSS Selective Service File, Government's Ex. No. 1.]

### CONCLUSION

The provisions of LBM No. 72 are applicable to certain very limited and explicit Selective Service Regulations. These regulations are listed in the LBM itself and are of a kind involving a specific period of time for a registrant to file information with his local board. The LBM makes no mention whatsoever of SSS Regulation 1625.2, which is the governing regulation in this case. Furthermore, in addition to not being mentioned in the local board memorandum, SSS Regulation 1625.2 is clearly not



that kind of prospective regulation as the others listed.

Since the date of postmark rule of LBM No. 72 does not apply to the instant case, the late claim provisions of SSS Regulation 1625.2 are controlling. As the appellant's late conscientious objector claim contained no facts whatsoever indicating that his change of status occurred after the mailing of the notice for induction, and regardless of the propriety of the telephonic board meeting, the defendant was in no way prejudiced, since no facts whatsoever were presented by him to the board to have permitted their finding of a change in status occurring after the notice for induction was mailed.

Respectfully submitted,

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